women, Goh Yoke Sze (*f*) and Chew Gueh Hua (*f*), the onus had then shifted to the respondent. We, however, do not agree with this submission. In our view, whether or not the onus of proof has shifted depends entirely upon the weight which the learned judge placed on the evidence before him and upon what presumption of law is there which operates either in favour or against the respondent. In this case, it is clear that the learned judge, after weighing the evidence very carefully, arrived at the conclusion that the first three women are wives, the first being the principal wife and the other two being the second and third wives. There is therefore no need for the respondent to lead any evidence at all as to his relationship with any of these three women. He is entitled to rely on the evidence of DW3 and on the presumption of marriage against concubinage, which we have already dealt with earlier.

The other presumption of law which operates in his favour is the presumption of falsehood, In a suit for defamation, once the words complained of are proved to be defamatory and published, the respondent being the plaintiff is not bound to prove falsity of these words because the law presumes it to be in his favour (*Belt* v. *Lawes*[5]). The result is that it is for the appellants, being the defendants in this case, to prove that these words are true. We have seen that they have been unable to do so. At the very best the evidence of DW1 and DW2 only shows that they believe the allegations they made against the respondent to be true without giving any satisfactory basis for such belief. Such evidence does not shift the onus of proof on to the respondent's side because belief is not a defence (*Peters* v. *Bradlaugh*[6]). Further their allegations claim that the respondent keeps numerous concubines. Surely by proving only two women who could possibly be his concubines will not be sufficient proof to discharge the onus because the proof of justification must be precise (*Beit* v. *Markham*[7]).

Therefore, on the basis of the evidence and presumptions, the appellants had not shifted the onus of proof to the respondent. That being the case, there is no need for the court to consider whether the respondent's wives were registered under the Chinese Marriage Ordinance of Sarawak (Cap. 72) as was submitted by counsel for the appellants, because the issue before the court is not whether the respondent's marriage to these women is valid or invalid. In any case, we do not think that the non-registration of his marriages reduces his wives to the status of concubines. Counsel for the appellants further submitted to us that they are not bound to prove the negative, i.e. that these women are not wives, and so it is for the respondent to prove the converse, i.e. that these women are his wives. This is a very ingenious way of playing with the word "negative" in order to get themselves out of difficulties of proving the truth of their imputations that these women are mistresses or concubines of the respondent. The word negative is not an absolute term but a relative one. To say that a woman is a concubine is to deny her the status of a wife. On the other hand, to say that she is a wife is to negative her status as a mistress or a concubine. Therefore, there is really no substance in the submission which demands the respondent to prove that these two women are his wives. Such a submission is tantamounting to asking the respondent to discharge the onus of proof which is not his but the appellants'.

In this case it may well be that the appellants are unhappy because the respondent did not give any evidence at all as to his relationship with any of these three women or any other woman. No question was put to him on the subject when he gave evidence during the plaintiff's case, because of the ruling by the learned trial judge to the effect that the respondent's evidence on the appellants' defence of justification and fair comment should be given only after the appellants had given their evidence. However, when the appellants had completed their evidence and closed their case, counsel for the respondent informed the court that he did not wish to call any evidence in rebuttal as presumably he must have been relying upon the evidence of DW3 who said that these three women are the respondent's wives. Thus the respondent was not examined at all on the appellants' defences of justification and fair comment. On the other hand, there was nothing to prevent the appellants' counsel from recalling the respondent for the purpose of cross-examining him. However, this was not done. Instead, their counsel was contented to leave the matter to the learned judge to make a finding, knowing full well that there is a conflict between the evidence of DW1 and DW2 on the one hand and that of DW3 on the other. When the learned judge made a finding that the two women are the respondent's wives and not his concubines, the appellants now claim that the onus of proof had shifted on to the respondent who must then discharge it. We have considered this point very carefully and we come to the conclusion that having regard to the evidence which was accepted by the learned judge and the presumptions of law which operate in favour of the respondent, we do not think that the onus of proof had shifted on to the respondent's side. The onus was still on the side of the appellants who must prove the truth of their imputations and basic facts upon which their comment is based. This they had failed to do.

That being the case, we therefore dismiss this appeal with costs. The deposit should be paid to the respondent on account of costs.

Appeal dismissed.

Solicitors: *Yong & Co.; Chan & Co.*

AU KONG WENG v. BAR COMMITTEE, PAHANG

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya), Wan Suleiman, Chang Min Tat F.JJ. & Abdul Hamid J.) February 21 & March 14, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 175 of 1979]

Legal Profession — Advocates and Solicitors — Finding of Disciplinary Committee that advocate and solicitor guilty of unbefitting conduct — Suspension — Appeal to Federal Court — Undertaking given by advocate and solicitor — Breach of undertaking — Legal Profession Act, 1976, s. 93(2)(b).

In this case the Disciplinary Committee of the Pahang Bar Committee found that the appellant had been guilty of

conduct unbefitting an advocate and solicitor in that he had broken an undertaking given by him to another advocate and solicitor. The Bar Committee ordered the suspension of the appellant for a period of three months. The appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) on the facts as disclosed and found by the committee, the finding that the appellant was guilty of professional misconduct unbefitting an advocate and solicitor could not be successfully challenged before the Courts;

(2) a relationship of trust and confidence between the courts and the members of the Bar is essential for the due administration of justice in this country, and that relationship would be impaired, if on any but the most compelling grounds, the Courts were to interfere with the finding of the committee in a matter so peculiarly its concern.

Cases referred to:-

(1) *Bhandari* v. *Advocates Committee* [1956] 3 All E.R. 742.

(2) *T. Damodaran* v. *Choe Kuan Him* [1979] 2 M.L.J. 267.

(3) *In re Choe Kuan Him, Advocate and Solicitor* [1976] 2 M.L.J. 207.

(4) *Re Hilliard, ex parte Smith* (1845) 2 Dow. & L. 919.

(5) *Re a Solicitor, Ex parte Hales* [1907] 2 K.B. 539.

(6) *United Mining and Finance Corporation Limited* v. *Becher* [1910] 2 K.B. 296 at p. 304; on appeal [1911] 1 K.B. 840.

(7) *Re The Commonwealth Land, Building, Estate and Auction Company Limited* (1874) 43 L.J. Ch. 99.

[The following cases were also referred to in argument: *Lewis* v. *Nicholson* (1852) 18 Q.B. 503; *In re Williams* (1850) 12 Beav 510; *Thompson* v. *Gordon* 15 M. & W. 609; *Re Samuel* v. *Khodes* (1838) 2 Jur. 858.]

FEDERAL COURT.

Wong Weng Kai for the appellant.

Gandhi K. Singam for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): This is an appeal from a determination of the Disciplinary Committee of the Bar Committee of Pahang on August 10, 1979, that the appellant, an advocate and solicitor of the High Court, had been guilty of conduct unbefitting an advocate and solicitor pursuant to the provisions of section 93(2)(b) of the Legal Profession Act, 1976. Upon that finding the committee ordered his suspension as an advocate and solicitor for a period of three months and condemned him in costs in the sum of $1,000 (see section 101 of the Act). We dismissed the appeal.

It all started in this way. In Kuantan Civil Suit No. 256 of 1976, the plaintiffs sued Mr. Au Ah Wah, an advocate and solicitor in the firm of Messrs. Au Ah Wah & Co. for the sum of $16,271.56 based on two dishonoured cheques drawn by him. He is the father of the appellant who is a legal assistant practising in the said firm. Mr. V. Balendran of Messrs. Maxwell Kenion Cowdy & Jones acted for the plaintiffs. He obtained summary judgment on February 4, 1977. On February 16, he rejected the defendant's proposal to pay the judgment sum in three monthly instalments. Instead he demanded payment within 48 hours and threatened execution proceedings and in fact he filed execution proceedings on March 4, 1977. On March 16, the bailiff called on the premises of Messrs. Au Ah Wah & Co., to effect the execution. The appellant as solicitor on behalf of the defendant telephoned Mr. Balendran and requested him to lift the execution on the undertaking that the full sum of the judgment debt would be paid on or before March 21. On the said undertaking Mr. Balendran agreed to lift the execution.

The defendant's solicitors, however, on March 25 filed an application for a stay of execution and for payment of the judgment sum in three instalments. Hearing was fixed on March 25. Somehow the date of hearing was brought forward to March 19. On March 18, Mr. Balendran filed an affidavit in opposition to the application and alleging the undertaking by the appellant. No affidavit in reply was filed by the appellant. The Senior Assistant Registrar allowed the application. The plaintiffs' solicitors successfully appealed to the judge on April 6. The learned judge was critical of the appellant's conduct. He had this to say:

"The appellant counsel had made a very serious and grave allegation of dishonesty against Mr. Au Kong Weng which was serious enough in my view to require a sworn reply to it but he had not done so. I could not but come to the conclusion that such an undertaking was in fact made. Besides the facts were not inconsistent with one having existed. The respondent had already had the execution writ in his hands and execution was in process and could have been completed in good time. Why should the appellant suddenly in the midst of completion stay his hands when he was not obliged to, merely because the respondent was going to apply for a stay unless he was so stupid. The appellant had all to gain and nothing to lose by proceeding with execution. The circumstances clearly shows that he had done so only because he had been given a categorical undertaking or assurance by the respondent that the money was immediately forthcoming. He found himself deceived instead.

I would have no hesitation in allowing this appeal with costs.

I would not end this matter without saying that the circumstances of this case clearly merit the Bar Committee taking the necessary steps to investigate into the possibility of a professional mis-conduct by counsel concerned.

The Senior Assistant Registrar shall duly serve a copy of this judgment on the Secretary of the Bar."

The judgment sum was paid by the defendant's solicitors on April 7.

The Bar Committee took up the matter. Due enquiry was made. It was decided that the matter be formally investigated by the Disciplinary Committee consisting of members of the appellant's own profession under section 93(2)(b) of the Legal Profession Act which is as follows:

"Section 93 (2) Due cause may be shown by proof that the advocate and solicitor in Malaysia or elsewhere —

(b) has been guilty of dishonest conduct in the discharge of his professional duty or of fraudulent conduct or conduct otherwise unbefitting an advocate and solicitor; . . . ."

There were two issues before the Disciplinary Committee. First, whether the appellant was involved in bringing forward the date of hearing of the application for stay of execution and payment by instalments from March 25 to March 19. On this point the committee found no evidence to implicate the appellant. Secondly, whether the appellant gave a personal undertaking as a solicitor over the telephone to Mr. Balendran in the course of the proceedings to pay the judgment sum on or before March 21, 1977 to induce Mr. Balendran not to proceed with the execution. The finding of the committee is:

"As regards whether Mr. Au Kong Weng had in fact given an undertaking to Mr. Balendran on the 16th day of March 1977 to pay the full judgment debt by the 21st day of March

1977 and thereby get him to lift the execution, we find that Mr. Balendran was speaking the truth when he said that an undertaking was so given or else he would not have requested the executing officers to leave the defendant's premises. In fact the subsequent conduct of Mr. Balendran in filing an affidavit alleging the undertaking and complaining before the learned judge of its breach are consistent with Mr. Au Kong Weng having given an undertaking. We do not believe Mr. Au Kong Weng when he says that he did not give any such undertaking but the execution was lifted merely on his plea for time.

First, Mr. Balendran took a clear and bold step to accept a brief against a fellow solicitor practising in the same town. As a first step he sent two letters of demand, one for each cheque dated the 4th day of August 1976. Messrs Au Ah Wah & Co. acting for the defendant replied to the earlier letter only by their letter dated the 10th day of August 1976 saying payment would be made within 7 days. No payment was forth coming even after issue of the Writ and its service after obtaining judgment and upon executioners having arrived at the defendant's office.

Secondly, Mr. Balendran on the 18th day of March 1977 swore an affidavit setting out the undertaking, while Mr. Au Kong Weng pleads that he had no time to reply to the affidavit, which may be acceptable, still we are of the view that he should have answered the serious allegation of Mr. Balendran either in filing an affidavit before the appeal was heard by the learned judge or at least written a letter in the strongest terms to Mr. Balendran.

Thirdly, Mr. Au Kong Weng has admitted that Mr. Balendran had asked for an undertaking and insisted on payment before the 21st March 1977.

Fourthly, having failed to receive payment within 7 days having refused payment by three instalments and arrived at the premises for execution especially against a fellow solicitor's office Mr. Balendran or for that matter any solicitor would not agree to listen to a plea for time and that too, without any definite date for payment being specified unless there was a solicitor's undertaking.

Fifthly, Mr. Balendran swore an affidavit in which he has alleged the undertaking and its breach and also mentioned it before the learned judge. We find that there is no record of the denial of these allegation by Mr. Au Kong Weng apart from these proceedings before us.

For reasons aforesaid we are of the unanimous view and are satisfied that Mr. Au Kong Weng did give an undertaking on the 16th day of March 1977 to Mr. Balendran to pay the judgment sum in Kuantan High Court Civil Suit No. 256 of 1976 by the 21st day of March 1977 and breached that undertaking when no payment was made by that date."

The same point was taken before us, that there was not that high standard of proof as required in cases of this nature that the appellant had given a solicitor's undertaking in "clear, unqualified and unequivocal terms": see *Bhandari* v. *Advocates Committee*;[1] *T. Damodaran* v. *Choe Kuan Him*.[2] It was also urged before us that the appellant had merely said to Mr. Balendran that as he had no authority to sign cheques etc. for his father, he would speak to his father about paying on or before March, 21, and that if he had given any undertaking, there was no proof that he had given the undertaking personally, and in his *professional* capacity as a solicitor, in view of the father-son relationship between him and the defendant in the suit, out of which this matter arose. It is a question for the committee to decide, first, whether the facts alleged in the charge had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct. The absence in the Committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it. As a matter of fact that point was referred to in the very first paragraph of the appellant's written submission before the Committee and which is incorporated in page 126 of the appeal record. We have not the slightest doubt that that point was in the forefront of the committee's consideration.

The issue to be decided was an issue of fact. There was no dispute or doubtful question of law in it whatever. The respective stories from the two sides were completely irreconcilable so that the task of the committee was to make up its mind as to the true version of what happened. The conclusion arrived at by it was that the appellant did give a solicitor's undertaking and he had failed to honour it. The finding is a finding of fact with which, of course, this court should not in the circumstances of this case interfere. We need only add that at the appeal, the appellant's counsel was constrained to admit this undertaking on the part of his client.

There are no closed categories of professional misconduct. One of the most fundamental duties of an advocate and solicitor, recognised for as long as the profession has been in existence, is that he must honour to the utmost the promise or undertaking given by him in a professional capacity to the court and to members of his profession and failure to honour it is regarded as a breach of professional conduct: see *In re Choe Kuan Him, Advocate and Solicitor*.[3] The honesty of officers of the court is very much the concern of the court: see *Re Hilliard, Ex parte Smith*;[4] *Re a Solicitor, Ex parte Hales*;[5] *United Mining and Finance Corporation, Limited* v. *Becher*;[6] In *Re The Commonwealth Land, Building, Estate and Auction Company (Limited)*[7] where a solicitor had agreed to accept the costs of a dismissed petition from the solicitor for the petitioners, his agreement was construed as an undertaking not to issue writs of execution and he was made liable for the costs of the proceedings to set aside the writs of execution even though the writs were issued by his clerk without his knowledge.

"Where a solicitor, who is acting professionally for a client, gives his personal undertaking in that character to a third person, that undertaking may be enforced summarily, upon application to the court. Before this remedy can be pursued it must be shown that the undertaking was given *personally*, and not merely as agent on behalf of the client; the undertaking must also be given by the solicitor, not as an individual, but in his *professional* capacity as a *solicitor*."

This passage omitting unnecessary words is from *Halsbury's* Laws of England (3rd Edition) at page 195 and was cited to the Disciplinary Committee.

Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.

Following this trend, our Legal Profession Act, 1976 has now entrusted the duty of seeing that the members of the profession maintain the highest standards of probity which are demanded by a profession dealing with the rights properties and liberty of the people, to the members of the profession themselves. In our respectful view, it cannot be gainsaid that the members of the profession must be able to rely on the spoken word of each other and that a breach of

this undertaking is a serious matter. We would refer to a passage in '*A guide to the professional conduct of solicitors*' issued by the Council of the Law Society (U.K.) 1974, Chapter 4, Rule 2:19 which is of material interest:

"A breach of an undertaking to the court, to the Disciplinary Committee, to The Law Society or to accountants employed by the Society have all been held by the Disciplinary Committee to be unbefitting conduct."

On the facts as disclosed and found by the committee, we could not see how the finding that the appellant was guilty of professional conduct unbefitting an advocate and solicitor could be successfully challenged before this court. Members of the Bar are officers of the court and are expected to comport themselves honourably, as befit members of the honourable profession. The appellant's failure to honour the undertaking by itself demonstrates his unfitness to belong to a profession where, in practice, his colleagues must insist upon the maintenance of the highest standards.

A relationship of trust and confidence between the courts and the members of the Bar is essential for the due administration of justice in this country, and that relationship would be impaired if, on any but the most compelling grounds, the courts were to interfere with the finding of the committee in a matter so peculiarly its concern.

Appeal dismissed.

Solicitors: *Mah-Kok & Din.*

DATUK PASAMANICKAM & ANOR v. AGNES JOSEPH
R. NARAYANAN SAMY v. AGNES JOSEPH

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Salleh Abas F.J.J.) March 11 & 26, 1980]

[Kuala Lumpur — Federal Court Civil Appeals Nos. 245 & 248 of 1979]

Administrative Law — Declaration — Society — Article in Constitution of Society forbidding resort to court proceedings until matters are referred to Central Working Committee — Whether provision purports to oust jurisdiction of Court — Whether contrary to public policy.

Society — Article in Constitution of Society forbidding resort to court proceedings until matters are referred to Central Working Committee — Whether provision purports to oust jurisdiction of Court — Whether contrary to public policy.

In this case the respondent had brought an action for a declaration that the annual general meeting of a branch of the Malaysian Indian Congress was unconstitutional and unlawful on the ground that the required notice to hold the meeting was not duly and properly given. Article 15(4) of the Constitution of the Malaysia Indian Congress forbids members from resorting to Court proceedings in matters relating to their rights, obligations, duties and privileges unless and until such matters are first referred to the Central Working Committee. The learned trial judge held that this provision in the Constitution did not preclude the respondent from applying to the court as the complaint or dispute in this case was not of a domestic nature and there had been non-compliance with the rules relating to the giving of notice of meeting. He held that the respondent was entitled to the declaration sought. The appellants appealed. The only ground taken on appeal was that article 15(4) of the Constitution of the Malaysian Indian Congress purports to oust the jurisdiction of the Courts and is consequently against public policy and void.

Held: (1) Article 15(4) of the Constitution of the Malaysian Indian Congress provides as a first step that reference to the Central Working Committee is a condition precedent before resorting to court proceedings. The effect of this is that a member is not excluded from going to court but must first refer the matter to the domestic forum. Such a clause is legitimate and not contrary to public policy;

(2) in this case the matter should have been referred to the Central Working Committee before action in court was brought and the appellants were entitled to set up the failure to do so as a defence.

Cases referred to:-

(1) *Tharmalingam* v. *Sambanthan* [1961] M.L.J. 63.

(2) *Arthur M'Cowan* v. *The City of Glasgow Friendly Society & Ors.* [1913] S.C. 991.

(3) *Scott* v. *Avery* 10 E.R. 1121.

(4) *Atlantic Shipping Co.* v. *Dreyfus* 38 T.L.R. 534.

(5) *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478.

HIGH COURT.

V.C. George (*H. Parjit Singh* with him) for the plaintiff.

D.P. Vijandran (*M. Muthupalaniyappan* with him) for the 1st and 2nd defendants.

M. Jayasingam for 3rd defendants.

John Gomez for 4th defendants.

Cur. Adv. Vult.

Ajaib Singh J.: The plaintiff in this case seeks a declaration that the annual general meeting of the Parit Bakar branch of the Malaysian Indian Congress held on March 19, 1979 was unconstitutional and unlawful and therefore ineffective, null and void. She has named Datuk Pasamanickam and K. Tanalachimi, who were elected chairman and secretary respectively of the branch at that meeting, as the first two defendants. R. Narayanasamy who acted as the returning officer at the meeting is named as the 3rd defendant. The 4th defendant is Senator S. Subramaniam who is registered under section 9(c) of the Societies Act, 1966 as the public officer of the Malaysian Indian Congress thus bringing the national body itself as a party to this suit.

In her statement of claim the plaintiff has made a number of allegations against the Parit Bakar branch but at the commencement of the hearing of the suit it was agreed by the parties that the only issue to be determined was whether the annual general meeting of the Parit Bakar branch of the Malaysian Indian Congress held on March 19, 1979 was unconstitutional, unlawful, ineffective and null and void on the ground that the required notice to hold the meeting was not duly and properly given.

The plaintiff is one of the founder members of the Parit Bakar branch which was established in 1974 and her brother-in-law Mr. Kanniah was its chairman throughout until Datuk Pasamanickam was elected in his place at the annual general meeting of the branch held on March 19, 1979. The plaintiff who is now a kindergarten teacher had worked as a typist for Datuk Pasamanickam for about two years until mid-February 1979. In the course of time some members of the Parit Bakar branch became dissatisfied with the branch